IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-294

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, D. W. HOLMES, WILLIAM SYMONS, JR., VERNON L. STURGEON, LEONARD ROSS and ROBERT BATINOVICH, the members of and constituting said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

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The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California on the grounds that the appeal does not present a substantial federal question, that the federal question sought to be reviewed was

not timely or properly raised nor expressly passed on and that the judgment rests on an adequate non-federal basis.

I

OPINIONS BELOW

The Supreme Court of California by an order entered on May 25, 1978 denied Appellant's (Edison's) petition for rehearing of that court's decision filed on March 23, 1978 which upheld Decision No. 85731, dated April 27, 1976, of the Public Utilities Commission of the State of California (the Commission). Copies of the above order and decisions are contained in the Appendices appended to the Jurisdictional Statement.[1]

II

JURISDICTION

Jurisdiction is asserted by Edison under Title 28, United States Code, § 1257(2) (Jur. St. 2).

III

QUESTIONS PRESENTED

Edison challenges a portion of the Commission's Decision which requires the amortization, over a period not to exceed 36 months, of overcollections or undercollections previously made by Edison and other California electric utilities. This requirement was an integral part of the Commission's

[1]References herein to appendices are to those attached to the Jurisdictional Statement. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

change in the method by which these utilities are compensated through rate adjustments for significant changes in fuel costs.

Edison asserts said portion of Decision No. 85731 denies it due process of law secured by the Fourteenth Amendment of the U. S. Constitution.

The Commission hereby challenges Edison's assertion of juridiction for the reasons heretofore stated.

IV

ARGUMENT

A. Edison's Assertion That the Challenged Order Is a Denial of Due Process Secured by the Fourteenth Amendment of the U.S. Constitution Was Not Timely Nor Properly Raised in the Proceedings Below and Thus Is Not Properly Before This Court.

Title 28, Section 1257(2) requires by its terms that the federal question be ". . . drawn in question."

The California Supreme Court did not address any constitutional challenge to the Commission's order (Jur. St. 8). Therefore jurisdiction is lacking unless it be shown that the federal question was raised below in a timely and proper manner, *Walters v. City of St. Louis, Mo.*, 1954, 347 U.S. 231. Moreover, this Court has consistently held that the proper method of raising the federal question is dependent upon state practice, *Parker v. Illinois*, 1948, 333 U.S. 571, 574-5; *Michel v. Louisiana*, 1955, 350 U.S. 91, 93; *Beck v. Washington*, 1962, 369 U.S. 541, 549.

Edison admits the question was not raised either during the hearing or in its post-hearing brief before the Commis-

sion, but for the first time in its petition for rehearing (Jur. St. 7). This Court has held, in *Live Oak Ass'n v. Railroad Commission,* 1926, 269 U.S. 354, 357-8, that such a filing is not a timely claim and does not establish jurisdiction in this Court.

Edison also failed to raise the federal question in a timely and proper manner before the court below. As its petition to the California court shows (Appx. G), the specifications of error make no mention of federal law nor of the U.S. Constitution. The only language which could possibly be understood to raise a federal question is contained in one phrase, to wit, ". . . and unless this court so acts, petitioner will be unjustly and unlawfully deprived of its property without due process of law . . ." (Appx. G, p. 123). No authority whatever is cited for this conclusion.

The general rule in California is that contentions in an appellate brief which are supported neither by argument nor citation of authority are deemed to be without foundation and to have been abandoned, *People v. Mclean,* 1902, 135 Cal. 306; *Grayson v. Grayson,* 1955, 132 Cal.App.2d 471; *Utz v. Aureguy,* 1952, 109 Cal.App.2d 803. There can be no question but that Edison's petition, which under California rules is the brief on appeal, was insufficient to raise the federal question and that the court was therefore justified in considering the point waived or abandoned.

Edison attempted to recover from its failure to argue a federal question in a timely and proper manner by bringing in new material in its reply brief to the Commission's answer and in its petition for rehearing to the court below.

(Appx. I, p. 181, Appx. J, p. 213). In the former pleading, such effort was inappropriate under state law because the Commission's answer (Appx. H) had not addressed the subject, *Richard v. Richard,* 1954, 123 Cal.App.2d 900; *Radinsky v. Thomas (T.W.) Inc.,* 1968, 264 Cal.App.2d 75. Raising or arguing the issue for the first time in a petition for rehearing to the reviewing court was clearly untimely, c.f. *Live Oak Ass'n v. Railroad Commission,* 1926, 269 U.S. 354, 357.

B. The Judgment of the California Supreme Court Affirming the Commission's Order Rests on an Adequate Non-Federal Basis.

A fair reading of the decision of the California court (Appx. A) shows that that court heard and decided Edison's appeal on state grounds, to wit, whether the challenged portion of the order constituted retroactive ratemaking which that court had previously held to be impermissible under state law in *Pacific Telephone and Telegraph Co. v. Public Utilities Commission,* 1967, 62 Cal.2d 634 and *City of Los Angeles v. Public Utilities Commission,* 1972, 7 Cal.3d 331.

In those decisions the California court had held that, although the California Legislature could authorize the Commission to set rates retroactively, it had not done so. In its decision below (Appx. A, p. 3), the California court reaffirmed the rule against retroactive ratemaking but distinguished the Commission's challenged order on its facts, holding that the Commission had acted within its authority under state law. This Court has consistently held that such a determination is a state matter not reviewable by this

Court, *Pennsylvania Railroad Co. v. Towers,* 1917, 245 U.S. 6; *Atlantic Coast Line Railroad Co. v. No. Carolina Corp. Commission,* 1907, 206 U.S. 1; *Madden v. Kentucky,* 1940, 309 U.S. 83.

C. The Appeal Raises No Substantial Federal Question.

Edison admits that the due process guarantees of the Fourteenth Amendment are not immune to a proper exercise of a state's police power. Rather, Edison asserts, the Commission's order was retrospective and was not a proper use of such power because Edison had no foreknowledge of such action and no public purpose was served thereby, citing a number of decisions, none of which dealt with special adjustments to utility rates designed to recover changes in fuel costs.

However, as the California court recognized, all the Commission's order did was to set a definite time (within 36 months) for Edison to repay overcollections which Edison, by its own admission to that court, would have had to repay eventually because of cyclic weather conditions (Appx. A, p. 15). The rationale for doing so was that, under the new procedure, Edison's adjustments would not be based on future weather forecasts but would follow actual experience. Edison, therefore, would henceforth not be subject to offsetting undercollections resulting from adverse weather conditions.

This being so, the question of due process really should be posed in terms of whether the Commission's action was arbitrary or unreasonable, *American Toll Bridge Co. v.*

Railroad Commission, 1939, 307 U.S. 486; *Benjamin v. Columbus,* 167 Ohio 103, cert. den., 1958, 357 U.S. 904. In ratemaking decisions it is not the method or formula used but the end result which is controlling in arriving at a determination that the decision is fair and reasonable, *Federal Power Comm'n. v. Hope Natural Gas Co.,* 1944, 320 U.S. 591, 602.

The court below held that not only was the Commission's order in accordance with state law, it was also a fair and reasonable means of preventing a "windfall" to Edison that was neither intended by the Commission in approving Edison's rate adjustment procedures nor contemplated by Edison (Appx. A, p. 13).

A decision so reasonable on its face having been reached after extensive hearing and argument, in which Edison had every opportunity to present its case, can not seriously be maintained to raise a substantial federal question of due process.

Moreover, the dire financial consequences of the Commission's decision alleged by Edison are mere chimera. Edison is the only California utility resisting the Commission's order; the others have complied without experiencing any of the disasters pictured by Edison.[2] This fact, too, attests to the lack of a substantial question.

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[2]Edison's statement at Jur. St. 7 that the challenged portion of the Commission's order is stayed is not quite correct. It was stayed only as to Edison. It remains in effect as to all other electric utilities. Pacific Gas and Electric Co. and San Diego Gas & Electric Co., both of which, like Edison, had accumulated substantial overcollections, have complied with the order in all respects.

V

CONCLUSION

Because Edison's contentions were not timely or properly raised in the proceeding below, were not addressed by that court, and do not raise a substantial federal question, the matter having been decided below on adequate state grounds, we respectfully submit that the appeal should be dismissed or, alternatively, the judgment should be affirmed.

Dated, San Francisco, California
September 20, 1978.

Respectfully submitted,

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